Petition

83-675

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IN THE

SUPREME COURT

of the

UNITED STATES

Term, 1983

UNITED STATES OF AMERICA

vs,

WILLIAM P. MITLO

Petitioner

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM P. MITLO,	)
	)
Petitioner,	)
	)
vs.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent	)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

QUESTIONS PRESENTED FOR REVIEW

1. May the Government use fraud and deceit to secure incriminating information of past conduct from an accused after the accused and his lawyer advised the United States Attorney and the investigating agents that the accused relied upon his Fifth Amendment rights not to be interviewed by the Government agents, not to testify before a Federal Grand Jury and his Sixth Amendment right to have counsel present at all times?

2. Did the recording of two (2) telephone conversations and a face-to-face conversation between a Government Operative

violate the accused's Fifth and/or Sixth Amendment rights when the electronic eavesdropping occurred after the accused and his attorney advised the Government that the accused invoked his Fifth and Sixth Amendment rights and after the appearance date set forth in a Federal Grand Jury Subpoena in which the accused invoked his Fifth Amendment right?

STATEMENT OF JURISDICTION

Judgment of the Court of Appeals was entered on August 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

APPLICABLE CONSTITUTUIONAL PROVISIONS

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of his life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner, WILLIAM P. MITLO, is a chiropractor with offices in New Castle, Pennsylvania. On a tip from his former secretary, agents of the Postal Authorities and the Department of Health and Human Services began an investigation into MITLO. During the course of the investigation, the agents visited MITLO to discuss alledged Medicaid fraud and secure records from him on April 8, 1980. MITLO telephoned his lawyer, who advised him not to talk to the agents, and who also told the agents that MITLO would not provide any information to them. On the advice of counsel, MITLO invoked his Fifth and Sixth Amendment rights at that time, indicating that he wished to have his counsel present and refused to deliver records and refused to talk any further with the agents.

The agents then served a Federal Grand Jury Subpoena on MITLO, directing that he appear before a Federal Grand Jury two (2) days later. MITLO's lawyer then contacted the United States Attorney and advised him that if MITLO appeared before the Federal Grand Jury, he would invoke his Fifth Amendment rights and confirmed that in writing to the United States Attorney. The United States Attorney advised MITLO's lawyer that MITLO's appearance would not be necessary before the Grand Jury in light of his invocation of the Fifth Amendment.

Approximately two (2) months later, the Government agents spoke to Ronald McAllen, one of MITLO's patients, who, according to Medicaid records, made 204 office visits to MITLO. McAllen reported to the Government agents that the number of his visits was accurate, but that MITLO had apparently over-reported the number of visits McAllen's son had made. The Government agents then requested McAllen to enter into conversations with MITLO in an effort to secure information concerning MITLO's

billings for McAllen's son during the period of April, 1977 through December, 1978. The charges for McAllen's son's treatments had terminated 18 months prior to the Government's securing McAllen as its operative. McAllen was advised not to disclose that he was acting on behalf of the Government.

The Government recorded three (3) conversations between McAllen and MITLO. The first two were telephone conversations initiated by McAllen and the third was the recorded face-to-face conversation. The information sought by McAllen on behalf of the Government was of MITLO's past conduct and not in regard to any present on-going criminal conduct or any future criminal conduct.

MITLO was subsequently indicted on four (4) counts of Medicaid fraud, 18 U.S.C. Section 1001, and five (5) counts of mail fraud, 18 U.S.C. Section 1341. Pursuant to a Motion to Suppress filed on behalf of MITLO, the District Court suppressed the recordings of the two (2)

telephone conversations and the conversation conducted in his office. Jurisdiction of the Circuit Court of Appeals was by virtue of Title 18 U.S.C., Section 3731 and jurisdiction of the District Court was by virtue of Title 18 United States Code Section 3221.

REASON FOR GRANTING PETITION

The District Court found clear and convincing evidence that MITLO had been tricked and/or deceived by the affirmative misrepresentations of the Government agents, which caused him to provide incriminating information against his will. This finding remained undisturbed by the Circuit Court.

The standard for considering MITLO's claim was concisely articulated in United States vs. Allen, 522 F.2d 1229 (6th Cir. 1975), cert. denied, 96 S.Ct. 854 (1976), and United States vs. Marra, 481 F.2d 1196 (6th Cir. 1973), cert. denied, 414 U.S. 1004 (1974), in which the Court held that if the Defendants had sustained their burden of proving that the Government had used fraud, deceit and/or misrepresentations to trick the Defendant into giving incriminating information, the evidence secured would have been suppressed. In United States vs. Allen,

supra, Defendant was convicted of willful evasion of income tax and sought to attack the District Court's denial of his motion to suppress statements made by him to representatives of the Internal Revenue Service. Although the Allen Court declined to suppress the statements, it stated the applicable law:

> "In the absence of a clear showing that the taxpayer had been tricked or deceived by the Government Agents into providing incriminating information, the documents and statements obtained by the Internal Revenue Agents are admissible, United States vs. Marra, 481 F.2d 1196, 1203 (6th Cir. 1973), cert. denied, 414 U.S. 1004, 94 S.Ct. 361. The District Court's factual findings that there was no such showing are supported by substantial evidence and are not clearly erroneous 522 F.2d at 1233."

522 F.2d at 1233.

Similarly, in United States vs. Marra, supra., cited by the Allen court above, the Defendant was convicted of making false income

tax returns. The Defendant claimed that his statements and property "were obtained by deceit and misrepresentation, both active and passive, to the effect that the nature of the investigation was that of a routine civil audit." 481 F.2d at 1200. The Court of Appeals for the Sixth Circuit found no acts of fraud or deception by the Government, however, the Court indicated that the use of fraud and deceit would not be sanctioned if the evidence clearly indicated that was the method utilized by the agents to secure the incriminating information.

Although the applicable law was articulated in both Allen and Marra, neither record was found to have disclosed a factual basis that the Agents used trickery or deceit in obtaining the incriminating information as the record disclosed in the MITLO's case.

The District Court suppressed MITLO's statements because of the particular facts of his case which were clearly of the type referred to in Allen and Marra.

The Circuit Court based its reversal of the District Court on U.S. v.Hoffa, 385 U.S. 293 (1966), whose facts are unrelated to those in the instant case. In Hoffa and its progeny, the Defendants had not been personally interviewed by Government agents, subpoenaed to a grand jury, nor had they entered into specific communications through counsel with the Government in which the Fifth and Sixth Amendments were invoked. Hoffa recruited the government operative to actively engage in the crime of jury tampering during the course of a Federal trial in which he was the Defendant. Hoffa did not know that he was conspiring with a Government agent in the planning and execution of a scheme to tamper with a juror in the case in trial. Following a conviction for jury tampering, Hoffa charged that the Government could not utilize an informer to secure incriminating conversations because he was represented by counsel, was under indictment, and in trial at that time. However, the eavesdropping was not applicable to the case for which he was on trial and represented by

counsel, but rather a new crime which he was planning and was in the process of committing. The informer was not utilized to secure information of past conduct, but rather of a present crime for which Hoffa was not represented by counsel, had not been subpoenaed to the Grand Jury and had not invoked his Fifth and Sixth Amendment rights.

In the cases relied upon by the Circuit Court, the Government investigation began with the informer or operative acting in an undercover capacity before the subject communicated the invoking of his Constitutional rights to the Government. To apply Hoffa and its progeny to MITLO's case requires a disregarding of the factual basis for the Hoffa decision and the MITLO case. The defense does not dispute the quotations taken from Hoffa vs. United States and the other cases cited by the Circuit Court set forth on Page 8 of its Opinion as they apply to those cases. However, the factual applicability of those cases to the instant

case is vigorously challanged.

In none of the cases cited by the Circuit Court did the Defendant prior to the eavesdropping which was secured by fraud, trickery or deceit, advise the Government that he elected to stand on his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel. The Court totally disregarded the factual background of MITLO's interrogation in order to reach its conclusion.

The law appears to be settled that certain conduct of the Government, such as custodial interrogation requires that the Government advise an accused of his Constitutional rights. However, if an individual is aware of those constitutional rights, and elects to invoke them before the Government has a duty to advise him of their existence the Government may not use fraud, deceit or trickery to secure incriminating information in violation of the clear and unambiguous intent of the person to invoke his constitutional rights. If fraud and deceit is permissible in the factual basis

of MITLO's case then force and fear must also be accepted as permissible Government conduct. It is no less wrong for the Government to use force or fear to secure incriminating information than it is to use fraud and deceit to secure that same information after one has elected to stand upon his Constitutional rights and clearly communicated it to the Government.

It is therefore requested that MITLO's Petition for Certiorari be granted.

MANIFESTO & DOHERTY, P.C.

By William F. Manifesto, Esq.
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA)
)
vs.)
)
WILLIAM P. MITLO)

OPINION

I. Procedural History

Defendant William P. Mitlo, a doctor of chiropractics licensed to practice in Pennsylvania, is charged in a nine count indictment with violating Title 18, United States Code, Sections 1341 and 1001, by making false and fraudulent statements with respect to Medicaid claims and with mail fraud in the use of the mails to implement and execute a scheme and artifice to defraud. In particular, Count 4 of the indictment charges that the Defendant, William P. Mitlo, "willfully and knowingly did make, and cause to be made, false, fictitious and fraudulent statements and representations as to the material fact in a matter within the jurisdiction of the Department of Health and Human Services, an agency of the United States,

in that in PA-259 Forms (Standard Medical Invoices) submitted to the Commonwealth of Pennsylvania, Department of Public Welfare, 123 Walnut Street, Harrisburg, Pennsylvania, William P. Mitlo stated and caused to be stated, that 204 routine office visits were provided to Ronald J. McAllen from February 1977 to December, 1978, whereas in truth and fact, as the defendant then well knew, substantially less than 104 routine office visits were provided."

Defendant has filed various pre-trial motions which have been ruled on previously, however, presently pending before this Court is a Motion to Suppress two recorded telephone conversations and one face-to-face conversation between Defendant Mitlo and one Ronald McAllen. Hearing on the Motion to Suppress was held June 21, 1982, and argument on that motion was held November 12, 1982. Following receipt of the transcripts, briefs, and other pertinent

information, the Court now issues its Opinion, granting Defendant Mitlo's Motion to Suppress.

II. Findings of Fact

For purposes of this Motion to Suppress, the Court makes the following findings of fact.

On or about March 7, 1980, agents of the Inspector General's Office of the Department of Health, Education and Welfare were advised by the Pennsylvania State Police that a former medical secretary of Dr. William P. Mitlo wished to speak with them about possible violations of Medicaid regulations by Defendant William Mitlo. As a result of this information, HEW agents met with and interviewed the former medical secretary.

On April 8, 1980, Agents Daniel Sherry of the United States Health and Human Services Department (formerly Health, Education and Welfare Department), and William Johnson of the United States Postal Department went to Defendant Mitlo's

office with a Grand Jury Subpoena for Mitlo's medical records and attempted to interrogate Defendant Mitlo and to secure certain records of Defendant Mitlo. Defendant Mitlo advised the agents that he would not answer questions or deliver doucments until he spoke with his attorney, and in the presence of the agents Mitlo did contact his attorney. Agent Sherry telephonically spoke with Defendant Mitlo's attorney, who told the agents that the Defendant would not provide any information to them. Agent Sherry advised the attorney that he would serve the Defendant with a Federal Grand Jury Subpoena for an April 10, 1980 appearance, which was accomplished. Defendant Mitlo acted on the advice of his counsel and invoked his Fifth and Sixth Amendment rights by refusing to deliver any records or talk to the agents, and by indicating that he wished to have his counsel present. Mitlo's attorney later advised the United States Attorney that if Mitlo appeared before the Grand Jury he would invoke his Fifth

Amendment rights, and the United States Attorney instructed Mitlo's attorney that Mitlo's appearance would not be necessary in these circumstances.

The agents continued their investigation by interviewing present and former patients of Mitlo to determine whether the patients made all of the visits for which Mitlo billed the Medicaid program.

In June, 1980, the agents contacted Ronald McAllen, a patient of Dr. Mitlo, and his wife, concerning Defendant Mitlo's treatment of Mr. McAllen and their son, and McAllen met with Agent Sherry in New Castle, Pennsylvania on June 19, 1980. At that time McAllen said that the bills appeared to be accurate with respect to him, McAllen, but that McAllen's son did not visit Defendant Mitlo as many times as the records indicated. McAllen told the agents that he spoke with Defendant Mitlo by phone a few weeks prior to that interview in

New Castle, and Mitlo wanted McAllen to contact me, apparently in regard to making arrangements to be interviewed by Mitlo's attorney or investigators, with respect to Mitlo's billing procedures.

A few days later McAllen had another meeting with the agents in New Castle, and McAllen was asked by the agents to make calls to Defendant Mitlo, which they would record, and to get Mitlo to talk about the treatment of McAllen's son because of the Defendant, Dr. Mitlo, would not talk to the agents. McAllen agreed, and on June 24, 1980, McAllen had two telephone conversations and one face-to-face meeting with Mitlo, all of which the government recorded. On these occasions, McAllen became an operative for the Government.

McAllen placed two phone calls, in the presence of the agents, to Defendant Mitlo on June 24, 1980 at 11:06 AM and 12:09 PM, which were recorded by Agents Johnson and Sherry. At the time of the calls and the face-to-face conversation, the Government agents knew that

Defendant Mitlo, acting on the advice of counsel, had earlier declined to make any statements to the agents or produce any records, and knew that Mitlo had earlier invoked the protection of the Fifth Amendment. Nevertheless, the agents solicited the assistance of McAllen and directed McAllen's actions whereby McAllen made the phone calls to arrange a meeting in Mitlo's office. McAllen repeatedly assured Mitlo during the phone conversations that the agents had informed McAllen that Mitlo's phone was not being tapped.

The face-to-face meeting with Mitlo at his office took place at 5:24 PM on June 24, 1980, and was recorded by a body microphone placed on the person of Ronald McAllen who was then acting as an operative for the government. McAllen intentionally and in a deceptive manner brought about the conversations with Mitlo for the purpose of obtaining incriminating information which Mitlo, after consulting with his counsel and after invoking his right to remain silent, had previously refused to provide directly to

the Government

III. Discussion

Defendant Mitlo contends that he invoked his Fifth Amendment rights, but that the government, acting through operative Ronald McAllen, continued to interrogate Mitlo in an effort to elicit incriminating statements from him, in violation of his constitutional rights. Defendant further contends that at the time of the June 24, 1980 conversations, Defendant Mitlo was the target of an investigation, and any attempted interrogation by the Government required that Defendant Mitlo receive his Miranda warnings, which was not done. (Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)).

In United States v. Allen, 522 F.2d 1229 (6th Cir. 1975), cert.denied, 96 S.Ct. 854 (1976), Defendant was convicted of willful evasion of income tax and sought to attack the district court's denial of his motion to suppress

statements made by him to representatives of the International Revenue Service. Allen further claimed that he was entitled to the benefit of Miranda warnings. Although the Allen court declined to suppress the statements, it stated the applicable law:

> In the absence of a clear showing that the taxpayer has been tricked or deceived by the government agents into providing incriminating information, the documents and statements obtained by the Internal Revenue agents are admissible, United States v. Marra, 481 F.2d 1196, 1203 (6th Cir. 1973), cert. denied, 414 U.S. 1004, 94 S.Ct. 361, 38 L.Ed.240. The District Court's factual findings that were there was no such showing are supported by substantial evidence and are not clearly erroneous.

522 F.2d at 1233

Likewise, in United States v. Marra, 481 F.2d 1196 (6th Cir. 1973), cert. denied, 414 U.S. 1004, 94 S.Ct. 361, 38 L.Ed.2d 240, Defendant was convicted of making false income tax returns. In Marra, the Defendant claimed that statements and property "were obtained by deceit and misrepresentation, both active and

passive, to the effect that the nature of the investigation was that of a routine civil audit." 481 F.2d at 1200. The United States Court of Appeals for the Sixth Circuit agreed with the District Court that there were no acts of fraud or deception of affirmative matters practiced by either of the Internal Revenue Service Agents, and that the incriminatory evidence was divulged voluntarily by the Defendant who knew all of the consequences of his act:

> We are satisfied, as was the District Judge, that the agent Norvell's requests for information from Marra's accountant and his expressed hope that the audit might be expeditiously concluded, cannot be read as masking a vicious plan to invade Dr. Marra's constitutional rights. The fraud, deceit, and trickery charged reside only in the conclusional assertions of Dr. Marra and his attorney. It should be mentioned that Norvell, who was conducting the audit for the civil division, had no direct conversations with Dr. Marra. As requested by Dr. Marra, Norvell's dealings were with the doctor's accountant and the charge fraud and deceit had to come, if at all, second hand from the accountant's reports of his dealing with Norvell.

481 F.2d at 1196.

The Marra Court found that the record failed to disclose any clear and convincing evidence of some affirmative misrepresentation to establish the existence of fraud. The mere failure of a revenue agent to warn the taxpayer that the investigation may result in criminal charges, absent any affirmative misrepresentation of the nature of the inquiry, was not sufficient to constitute fraud, deceit and trickery.

The factual situation presented in the instant case is clearly distinguishable from both Marra and Allen. In both of those cases the Defendants contended that they were misled by the agents as to the nature of the investigation, and Courts held that the record did not disclose a factual basis for the finding that the agents used trickery or deceit in obtaining the incriminating information. Here, however, the identity of McAllen as a government operative was concealed from the Defendant, who had no knowledge that his conversations with McAllen were being recorded by the government.

When a citizen is dealing with a known agent of the Internal Revenue Service in a routine tax investigation, there is no element of deceit or stealth involved because the ordinary taxpayer knows and expects that the government will pursue all evidence of misreporting. This is not the situation presented in the instant case. Here, because Defendant Mitlo was unaware of McAllen's identity as a government operative, he did not expect that incriminating evidence against him would be pursued. Unlike Marra and Allen, at the time he made the incriminating statements, Defendant Mitlo was unaware that McAllen was actually acting for the government and the government deliberately sent McAllen to Defendant Mitlo in the guise of a genuine inquiring patient, hoping that McAllen would be able to trick or deceive Mitlo into making the incriminating statements that Defendant Mitlo had previously rightfully refused to provide to the government agents. Defendant Mitlo was repeatedly deceived by the Government, by the actions of its operative,

McAllen, both as to the identity of McAllen as a government operative, and in the nature of McAllen's visit to Mitlo, which was arranged for the sole purpose of fraudulently eliciting incriminating statements from Defendant Mitlo about his past conduct with regard to Medicaid claims, even though Mitlo previously and unambiguously informed the Government of his intention to invoke his Fifth and Sixth Amendment rights.

The controlling law requires that we suppress these incriminating statments of the Defendant upon the factual finding in this case, based on clear and convincing evidence that this Defendant had been tricked and/or deceit caused the Defendant to unwittingly provide incriminating information to the Government against Defendant's will. This Court, as the finder of fact, has so found clear and convincing evidence of the aforementioned affirmative misrepresentations by the Government which were acted upon the Defendant to his legal detriment. All of the

incriminating statements were made by Defendant Mitlo to the government operative, Ronald McAllen, on June 24, 1980, must therefore be suppressed. An appropriate Order will be entered.

Paul A. Smimmons
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA)
)
vs.)
)
WILLIAM P. MITLO)

ORDER

AND NOW, this 23rd day of February, 1983, after considering the evidence presented at the suppression hearing in the above-captioned case; and after considering the arguments, briefs and contentions of the parties; and for the reasons previously set forth in the accompanying Opinion: IT IS ORDERED that Defendant's Motion to Suppress Statements be and the same is hereby GRANTED, and the tape recordings and/or transcripts of recordings made by the government on July 24, 1980 are inadmissible at trial.

Paul A. Simmons

United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 83-5217

UNITED STATES OF AMERICA, Appellant

vs.

MITLO, WILLIAM P.

(D.C. Criminal No. 82-00045)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT and WEIS, Circuit Judges,
and RE, Chief Judge*

JUDGEMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was Submitted under Third Circuit Rule 12(6), August 11, 1983.

APPENDIX C

On consideration whereof, it is now here ordered and adjudged by this Court that the Order of the said District Court, entered February 24, 1983, be, and the same is hereby reversed and the cause remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

ATTEST:

Sally Mrvos
Clerk

August 19, 1983

*Honor Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5217

UNITED STATES OF AMERICA

Appellant

v.

MITLO, WILLIAM P.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(PITTSBURGH)

(D.C. Crim. No. 82-00045)

Submitted Under Third Circuit Rule 12(6)

August 11, 1983

Before: ALDISERT and WEIS, *Circuit Judges*,
and RE, *Chief Judge*.*

(Filed August 19, 1983)

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* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

The question for decision in this appeal by the government is whether the district court erred in suppressing the use of three recorded conversations. Although the government recorded the conversations with the permission of one of the participants, the district court barred their use because it found that they had been obtained by trick and deception in disregard of the defendant's constitutional rights. Notwithstanding the court's findings of fact, we hold that the evidence should not have been suppressed. We reverse.

I.

Appellee William Mitlo is a chiropractor with offices in New Castle, Pennsylvania. On a tip from his former secretary, agents of the Postal Service and the Department of Health and Human Services visited Mitlo to discuss alleged Medicaid fraud. Mitlo telephoned his lawyer who advised him not to talk to the agents and who also told the agents that Mitlo would not provide any information to them. On advice of counsel, Mitlo invoked fifth and sixth amendment rights, indicated that he wished to have counsel present, refused to deliver records, and refused to talk further with the agents. Two months later the government agents spoke to Ronald McAllen, one of Mitlo's patients, who, according to Medicaid records, made 204 office visits to the chiropractor. McAllen reported to the investigators that the number of his visits was accurate but that Mitlo apparently had overreported the number of visits McAllen's son had made. McAllen later testified that he was worried that the investigation would result in loss of his welfare benefits and agreed to permit the government agents to record his future conversations with Mitlo. App. at 93a, 101a.

The government recorded three McAllen-Mitlo conversations. The first two were telephone conversations, initiated by McAllen, recorded by government agents at McAllen's end of the connection. In the first of these, Mitlo repeatedly urged McAllen not to say anything over the phone, but McAllen told Mitlo that he had been informed by the agents that Mitlo's phone was not tapped. App. at 154a-168a. In a second, shorter, recorded conversation, McAllen agreed to meet with Mitlo at the chiropractor's office. The agents then wired McAllen for sound by equipping him with a wireless microphone. McAllen met with Mitlo in Mitlo's office, and government agents recorded this face-to-face conversation. At the suppression hearing, McAllen testified that the agents had not specifically instructed him on what to say to or ask of Mitlo. *Id.* at 104a-05a.

Some two years later Mitlo was indicted on four counts of Medicaid fraud, 18 U.S.C. §1001, and five counts of mail fraud, 18 U.S.C. §1341. He moved to suppress the recordings of the two telephone conversations and the conversation conducted in his office. The district judge granted the motion because:

> Defendant Mitlo was repeatedly deceived by the Government, by the actions of its operative, McAllen, both as to the identity of McAllen as a government operative, and in the nature of McAllen's visit to Mitlo, which was arranged for the sole purpose of fraudulently eliciting incriminating statements from Defendant Mitlo about his past conduct with regard to Medicaid claims, even though Mitlo previously and unambiguously informed the Government of his intention to invoke his Fifth and Sixth Amendment rights.

United States v. Mitlo, 557 F.Supp. 520, 524 (W.D.Pa. 1983). The government filed a timely appeal. We have jurisdiction under 18 U.S.C. §3731.

II.

The government argues that, notwithstanding the court's finding of trickery, monitoring the conversations was not violative of Mitlo's constitutional rights, that the defendant had no sixth amendment right to the assistance of counsel because no "critical stage" of the proceeding had been entered, that he had not been arrested, had not been taken into custody, and had not been indicted.

The district court found that McAllen intentionally deceived Mitlo into talking. This finding is entitled to considerable deference. McAllen's testimony and the transcripts of the conversations support this finding. On review the district court's findings of narrative or historical facts are measured by the clearly erroneous test; as to the legal component of its conclusion, however, this court has plenary review. *United States v. Camiel*, 689 F.2d 31, 37 (3d Cir. 1982). *See also Universal Minerals, Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 103 (3d Cir. 1981).

III.

Settled interpretations of the fourth amendment furnish direction for the resolution of this appeal. The amendment does not protect a party to a conversation who reposes a trust or confidence in an undisclosed government agent or informant. *Hoffa v. United States*, 385 U.S. 293 (1966). The Supreme Court has stated, "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 302. For the undisclosed agent to simultaneously record the conversation with an electronic recording device on his person is no violation of the fourth amendment. *Lopez v. United States*, 373 U.S. 427, 438-39 (1963), nor is it unconstitutional to transmit the conversation

electronically to a remote place where it is overheard and recorded. *United States v. White*, 401 U.S. 745, 751 (1971)(plurality opinion); *On Lee v. United States*, 343 U.S. 747, 753-54 (1952). Where one party to the conversation consents to the electronic monitoring, the conversation is admissible. *Rathbun v. United States*, 355 U.S. 107 (1957).

Settled interpretations of the fifth and sixth amendments also provide guidance. Where a person is under investigation and in custody, he must be advised of his right to counsel. *Beckwith v. United States*, 425 U.S. 341, 347 (1976). One is not entitled to the protection simply because an investigation has focused upon him; the test is focus plus custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964). We have recently stated, "Under controlling law, *Miranda* warnings are required only when a person has been deprived of his freedom of action in some significant way." *United States v. Semkiw*, ___ F.2d ___, No. 82-1717 (3d Cir. July 20, 1983), slip op. at 3. The sixth amendment affords the right of counsel in all criminal prosecutions. This right attaches "[a]t or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *see also Massiah v. United States*, 377 U.S. 201 (1964). It also attaches at any "critical" stage of the prosecution. *Simmons v. United States*, 390 U.S. 377 (1968); *United States v. Wade*, 388 U.S. 218, 224-25 (1967); *Gilbert v. California*, 388 U.S. 263, 267 (1967). The Court has delineated certain "critical stages." *See Brewer v. Williams*, 430 U.S. 387 (1977) (post-arraignment questions); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearing); *United States v. Wade*, 388 U.S. 218 (1967) (post-indictment line-up); *Massiah v. United States*, 377 U.S. 201 (1964) (post-indictment questioning).

Thus, use against defendants of uncounseled statements made to undercover agents prior to arrest, indictment, or other initiation of charges was held to be proper in *Hoffa v. United States*, but use of such statements made after arrest or indictment is improper. *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. at 206. As we recently emphasized, "[I]t is clear from the Supreme Court's statements that the Sixth Amendment right to counsel, as enunciated in *Massiah* and *Henry*, does not extend to the pre-indictment period." *United States v. Ammar*, ____ F.2d ____, ____, Nos. 81-1745, 1746, 1865, 2064 (3d Cir. June 30, 1983), slip op. at 39.

IV.

With these principles in mind we proceed to analyze the contentions before us. Preliminarily, we observe that *United States v. Morrison*, 602 F.2d 529 (3d Cir. 1979), *rev'd on other grounds*, 449 U.S. 361 (1981), relied on by Mitlo, does not undercut orthodox sixth amendment law. Our holding was simply a spinoff of the *Massiah* doctrine that the defendant's right to counsel opens after the indictment is returned. In *Morrison* the government knew that on May 31, 1978, Mrs. Morrison was represented by counsel. She was indicted on June 28, 1978. Yet two months later, on August 23, 1978, narcotics agents visited her home and questioned her with neither the knowledge nor the permission of her counsel. We reversed her conviction. In the case at bar, however, even though the government agents knew that Mitlo was represented by counsel, the recorded conversations took place almost two years before indictment and arrest and well before Mitlo was deprived of his freedom in any way. These circumstances did not constitute a critical stage in the proceedings.

The district court clearly erred when it concluded that Mitlo was entitled to *Miranda* protection because he

was the target of an investigation. 557 F.Supp. at 523. *Miranda* created a presumption of coercion when a statement is obtained through interrogation initiated by the authorities after the defendant "has been taken into custody or otherwise deprived of his freedom in any significant way." 384 U.S. at 444. Misreading *Miranda*, the district court apparently relied on the "focus-of-investigation" theory suggested in *Escobedo v. Illinois*, 378 U.S. 478, 490-92 (1964). But as Judge Hunter, writing for us in *Steigler v. Anderson*, 496 F.2d 793 (3d Cir.), *cert. denied*, 419 U.S. 1002 (1974), emphasized:

> This Court and other circuits have held that *Miranda* abandoned the "focus" theory in favor of the more objective test of whether the "government has in some meaningful way imposed restraint on [a person's] freedom of action." In the absence of such restraint there simply does not exist the inherent pressures which *Miranda* warnings were intended to neutralize.

Id. at 798 (footnotes omitted)(quoting *United States v. Jaskiewicz*, 433 F.2d 415, 419 (3d Cir. 1970)). We therefore hold that the district court committed reversible error when it concluded both that Mitlo had a right to counsel at the time of his conversations with McAllen and that the government recordings were illegal and suppressible under *Miranda*.

V.

We now turn to the district court's theory that a statement should be suppressed if the declarant has been tricked or deceived by government agents into providing incriminating information. The court relied on isolated statements from two Sixth Circuit cases involving income tax prosecutions, *United States v. Allen*, 522 F.2d 1229 (6th Cir. 1975), *cert. denied*, 423 U.S. 1072

(1976), and *United States v. Marra*, 481 F.2d 1196 (6th Cir.), *cert. denied*, 414 U.S. 1004 (1973). In both cases the court sustained the admissibility of the statements, but by way of *dictum* suggested that if a trick or deception had been proved the statements might have been suppressed. Here, the trial court found that "based on clear and convincing evidence that this Defendant had been tricked and/or deceived by the affirmative misrepresentations of the Government, acting through McAllen as its agent, which trickery and/or deceit caused the Defendant to unwittingly provide incriminating information to the Government against Defendant's will." 557 F.Supp. at 524.

We will accept the findings of fact set forth in this statement as not clearly erroneous. But a legal proposition that these findings warrant suppression runs counter to *Hoffa v. United States* and its progeny. The Supreme Court made clear in *United States v. White*, 401 U.S. 745 (1971), that the Constitution was not offended by consentual monitoring and recording by means of a transmitter concealed on an informant's person, even though the defendant did not know he was speaking with a government agent. The Court has also stated: "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." *Hoffa v. United States*, 385 U.S. at 303 (quoting *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting)). It has also declared that "in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents." *Lewis v. United States*, 385 U.S. 206, 209 (1966).

The district court in this case had the inclination to suppress the conversations for the reasons set forth in its solicitous opinion, but it lacked authority to do so. Cer-

tain principles of the common law tradition, as distinguished from the Continental civil law tradition, bind both the district courts and the courts of appeals in the federal judicial hierarchy. Central to this tradition is *stare decisis*, a doctrine we summarized in *Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979). There we emphasized that precedents set by higher courts are conclusive on courts lower in the judicial hierarchy "and leave to the latter no scope for independent judgment or discretion." *Id.* at 970 (quoting H. C. Black, Law of Judicial Precedents 10 (1912)). Especially relevant to this case was our indirect reference to the Supreme Court: the judgments of the highest court in any jurisdiction are binding on all other courts when they deal with matters committed to the peculiar or exclusive jurisdiction of the court making the precedent. Moreover, a decision by this court, not overruled by the Supreme Court is a decision of the court of last resort of this federal judicial circuit and is therefore "binding on all inferior courts and litigants in the Third Judicial Circuit . . . ." *Id.* at 970.

The order of the district court suppressing the recorded statements will be reversed and the cause remanded for further proceedings in accordance with the foregoing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5217

UNITED STATES OF AMERICA,
Appellant

v.

MITLO, WILLIAM P.

(W.D. Pa. Crim. No. 82-00045)

Before: ALDISERT and WEIS, *Circuit Judges*, and RE, *Chief Judge*.*

AMENDATORY ORDER

It is ORDERED that the slip opinion filed on August 19, 1983, is amended as follows:

Delete in first full paragraph on page 5 the following sentence: "One is not entitled to the protection simply because an investigation has focused upon him; the test is focus plus custodial interrogation. *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964)."

Substitute therefor the following: "One is not entitled to the protection simply because an investigation has focused upon him; the test is whether there is custodial interrogation. *Miranda* v. *Arizona*, 384 U.S. 436 (1966)."

BY THE COURT,

RUGGERO J. ALDISERT
Circuit Judge

DATED: September 1, 1983

*Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

APPENDIX E

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Petition for Writ of Certiorari has been served upon the United States Attorney, Room 633 U.S. Courthouse, Pittsburgh, PA 15219 on this 7th day of October, 1983.

MANIFESTO & DOHERTY, P.C.

William F. Manifesto, Esq.
Attorney for Petitioner

Opposition

Office - Supreme Court, U.S.
FILED
NOV 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-675

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM P. MITLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

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WILLIAM P. MITLO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing the recorded statements that he made to a government informant before the return of an indictment.

On March 12, 1982, petitioner, a chiropractor, was charged in an indictment returned in the United States District Court for the Western District of Pennsylvania with four counts of Medicaid fraud, in violation of 18 U.S.C. 1001, and five counts of mail fraud, in violation of 18 U.S.C. 1341. Before trial, petitioner moved to suppress three taped conversations with one Ronald McAllen, one of petitioner's patients, that were recorded with the latter's consent two years before the return of the indictment. On February 23, 1983, the district court suppressed the conversations as evidence on the ground that the government was required to give petitioner warnings under *Miranda* v.

Arizona, 384 U.S. 436 (1966), because he was the target of an investigation and had been deceived into talking to the informant after petitioner had advised the government of his intention to invoke his Fifth and Sixth Amendment rights (Pet. App. A1-A14; 557 F. Supp. 520). The court of appeals reversed on the authority of *Hoffa* v. *United States*, 385 U.S. 293 (1966). It concluded that the use against a defendant of uncounseled statements made to undercover agents prior to arrest, indictment, or other initiation of charges was proper even where the defendant is tricked or deceived by government agents into providing incriminating information (Pet. App. D1-D9; 714 F.2d 294).

Petitioner contends (Pet. 8-14) that his statements should have been suppressed as evidence because he was tricked by the government into furnishing incriminating evidence after he advised the government that he elected to stand on his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final

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[1]It is now 20 months since the return of the indictment and seven months since the district court's suppression order. Further interlocutory review at this time would cause additional delay in trial of the charges against petitioner.

judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1983

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[2]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1983-11

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